INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statute and regulations involved	2
Statement	
Summary of argument	5
Argument:	
I. The case may be moot	11
II. The court of appeals properly determined that the district court should not have exercised jurisdiction over the present action because petitioner failed to exhaust his military remedies	24
III. The Uniform Code of Military Justice and the Manual for Courts-Martial authorized imposition of restraint upon petitioner pending appellate review of his court-martial conviction	35
A. The proposed transfer to Fort Leavenworth was legal	36
B. Military superiors have authority to place a person convicted by court-martial under restraint pending appellate review of his conviction	45
C. Restraint in this case was proper	56
Conclusion	59
Appendix	61

338-797—69——1

CITATIONS

Cases:

	Page
Beard v. *Stahr*, 370 U.S. 41	33
Burns v. *Wilson*, 346 U.S. 137	29, 55
Bus Employees v. *Missouri*, 374 U.S. 74	23
Carafas v. *LaVallee*, 391 U.S. 234	23
Carbo v. *United States*, 82 S. Ct. 662, review denied, 369 U.S. 868	54
Carlson v. *Landon*, 342 U.S. 524	54
Carroll v. *President and Commissioners of Princess Anne*, 393 U.S. 175	23
Clark v. *Gabriel*, 393 U.S. 256	34
Dawkins v. *Crevasse*, 391 F. 2d 921	33
Eagles v. *Samuels*, 329 U.S. 304	27
Fay v. *Noia*, 372 U.S. 391	24
Gallagher v. *Quinn*, 363 F. 2d 301, certiorari denied, 385 U.S. 881	27
Golden v. *Zwickler*, No. 370, O.T., 1968, decided March 4, 1969	23
Gorko v. *Commanding Officer*, 314 F. 2d 858	34
Gusik v. *Schilder*, 340 U.S. 128	8, 24, 25, 28, 33, 34, 36, 45
International Longshoremen's Ass'n, Local 1291 v. *Philadelphia Marine Trade Ass'n*, 389 U.S. 64	24
Jackson v. *Taylor*, 353 U.S. 569	46
Johnson v. *Zerbst*, 304 U.S. 458	26
Kahn v. *Anderson*, 255 U.S. 1	18
Levy v. *Dillon*, 286 F. Supp. 593	35, 42, 44, 50
Levy v. *Resor*, 17 U.S.C.M.A. 135, 37 C.M.R. 399	5, 12, 31, 32, 33, 35, 50, 51, 54, 57, 58
Levy v. *Resor*, 384 F. 2d 689, certiorari denied, 389 U.S. 1049	12, 17, 32, 35, 41, 42, 50, 57, 58
Noyd v. *McNamara*, 267 F. Supp. 701, affirmed, 378 F. 2d 538, certiorari denied, 389 U.S. 1022	3

Cases—Continued

	Page
Oestereich v. *Selective Service Board*, 393 U.S. 233	27, 34
Orloff v. *Willoughby*, 345 U.S. 83	29, 33, 34, 55
Peyton v. *Rowe*, 391 U.S. 54	23
Reid v. *Covert*, 354 U.S. 1	26
Stack v. *Boyle*, 342 U.S. 1	33, 54
Sweet v. *Taylor*, 178 F. Supp. 456	38, 44
Toth v. *Quarles*, 350 U.S. 11	26
Udall v. *Tallman*, 380 U.S. 1	39
United States v. *Augenblick*, 393 U.S. 348	20, 29, 32, 46
United States v. *Bevilacqua*, 18 U.S.C.M.A. 10, 39 C.M.R. 10	31, 33
United States v. *Brown*, 13 U.S.C.M.A. 333, 32 C.M.R. 333	14
United States v. *Bryant*, 12 U.S.C.M.A. 133, 30 C.M.R. 133	14, 18, 21, 22, 41, 50
United States v. *Lucero*, 18 C.M.R. 942	31
United States v. *May*, 10 U.S.C.M.A. 358	17
United States v. *McElroy*, 259 F. 2d 927, affirmed *sub nom. McElroy* v. *Guagliardo*, 361 U.S. 281	26
United States v. *Nelson*, U.S.C.M.A. No. 21,512, decided March 14, 1969	44, 54
United States v. *Petroff-Tachomakoff*, 5 U.S.C.M.A. 824, 19 C.M.R. 120	40, 52, 53
United States v. *Teague*, 3 U.S.C.M.A. 317, 12 C.M.R. 73	50, 52, 53
Whelchel v. *McDonald*, 340 U.S. 122	29, 46

Constitution, statutes and regulations:

United States Constitution, Article III	11
Military Justice Act of 1968 (82 Stat. 1335)	18, 54

Constitution, statutes and regulations—Continued
Uniform Code of Military Justice:
Page
Article 9, 10 U.S.C. 809 ..... 2, 61
Article 9(a), 10 U.S.C. 809(a) 16, 48
Article 10, 10 U.S.C. 810 ..... 2, 62
Article 13, 10 U.S.C. 813 ..... 2, 50, 52, 53
Article 14, 10 U.S.C. 814 17
Article 36, 10 U.S.C. 836 20
Article 57, 10 U.S.C. 857 ..... 2, 62
Article 57(b), 10 U.S.C. 857(b) 6, 7, 12, 14, 16, 18, 19, 20, 21, 22, 24, 39, 50
Article 58, 10 U.S.C. 858 43
Article 71, 10 U.S.C. 871 ..... 2, 17, 63
Article 71(c), 10 U.S.C. 871(c) 4, 6, 9, 38, 42, 54, 55
Article 72, 10 U.S.C. 872 17
Article 74, 10 U.S.C. 874 17
18 U.S.C. 3148 54
18 U.S.C. 3152(2) 54
18 U.S.C. 3568 15
Apprehension and Confinement: Military Sentences to Confinement, AR 633–30; AFR 125–30 ..... 2, 15, 21, 70
Air Force Manual 35–13:
Para. 2–29(h) 13
Air Force Manual 125–2:
Para. 2–16 ..... 44, 55
Para. 3–5 45
Para. 6–8 ..... 2, 37, 41, 69
Para. 6–16 ..... 2, 40, 41, 69
Att. 1 44
Att. 2 16
AR 633–5, ¶4b(2) 42

Constitution, statutes and regulations—Continued
Manual for Courts-Martial, United States, 1951:
Page
Para. 11d 18
Para. 18 ..... 2, 16, 64
Para. 18b 54, 55
Para. 20 ..... 2, 16, 64
Para. 20a 13, 49
Para. 21 ..... 2, 67
Para. 21d 51, 53, 55, 58
Para. 88e 17
Para. 89c 39, 43
Para. 93 ..... 40, 43
Para. 97a 17
Para. 97b 17
Para. 97c 20, 22
Para. 125 ..... 55, 68
Para. 126j 39
Para. 126k 39
Miscellaneous:
Manual for the Guidance of Prisoners, United States Disciplinary Barracks, Fort Leavenworth, Kansas (1967 ed.) 45
F. R. Crim. P. 46(a)(2) 54
Hearings on H.R. 2498 Before a Subcommittee of the House Armed Services Committee, 81st Cong., 1st Sess 17, 18
H. Rep. No. 491, 81st Cong., 1st Sess 17
S. Rep. No. 1601, 90th Cong., 2d Sess 18

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 830

CAPTAIN DALE E. NOYD, PETITIONER

v.

MAJOR GENERAL CHARLES R. BOND, JR., COMMANDER, TWELFTH AIR FORCE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The opinion of the court of appeals (A. 22–26) is reported at 402 F. 2d 441. The opinion of the district court (A. 16–21) is reported at 285 F. Supp. 785.

JURISDICTION

The judgment of the court of appeals was entered on October 30, 1968. A petition for a writ of certiorari was filed on December 13, 1968, and was granted on January 20, 1969 (A. 29). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner's present habeas corpus action, contending that post-conviction restraint constituted unlawful "execution" of his sentence to confinement prior to completion of military review of his court-martial conviction, has been rendered moot by the expiration of the sentence to confinement.

2. Whether the court of appeals correctly determined, in light of petitioner's failure to exhaust his available remedies within the military review system, that the district court should not have entertained his challenge to the restraint imposed upon him.

3. Whether restraint of petitioner pending completion of military review of his court-martial conviction constituted "execution" of his sentence in violation of the Uniform Code of Military Justice, or was otherwise unlawful.

STATUTES AND REGULATIONS INVOLVED

The pertinent portions of the Uniform Code of Military Justice (Arts. 9, 10, 13, 57, and 71, 10 U.S.C. 809, 810, 813, 857, and 871); the Manual for Courts-Martial, United States, 1951 (paras. 18, 20, 21, and 97); Air Force Manual 125–2 (paras. 6–8 and 6–16); and Air Force Regulation 125–30 (paras. 4 and 5) are set forth in the Appendix, *infra*, pp. 61–70.

STATEMENT

1. After completing an Air Force ROTC program as a distinguished military graduate in 1955, peti-

tioner accepted a commission as a regular officer in the Air Force and has served on active duty since that time. In return for Air Force financing of his graduate study for master's and doctoral degrees, he agreed to serve until June 1969. In 1966, while teaching at the Air Force Academy, he developed a belief that the conflict in Vietnam is immoral, and he sought, unsuccessfully, to be separated from the service or reassigned as a conscientious objector.[1]

Following his transfer to Cannon Air Force Base, New Mexico, petitioner was ordered by his superior officer to fly as an instructor with a student pilot, but he refused to do so (A. 37–38). On March 8, 1968, he was convicted by a general court-martial of willful disobedience of a lawful order (A. 4), and on March 9, 1968, he was sentenced to one year's confinement at hard labor, forfeiture of all pay and allowances, and dismissal from the Air Force. The convening authority approved the sentence on May 10, 1968, and directed that, "[p]ending completion of appellate review, the accused will be confined in the United States Disciplinary Barracks at Fort Leavenworth, Kansas" (A. 31). On September 3, 1968, the Air Force Board of Review affirmed the conviction (A. 35–47). A petition for review was granted by the United States Court of Military Appeals on Janu-

[1] Petitioner's challenge to the Air Force's denial of his applications, and his request for an injunction against assigning him to duties in connection with the conflict in Vietnam, were denied. *Noyd* v. *McNamara*, 267 F. Supp. 701 (D. Colo.), affirmed, 378 F. 2d 538 (C.A. 10), certiorari denied, 389 U.S. 1022.

ary 23, 1969, and the merits of the court-martial conviction are presently pending before that court.[2]

2. Petitioner makes no challenge in this proceeding to the validity of his conviction (see Pet. Brief pp. 22–23, 27–28). The present case involves only a dispute about the nature of the restraint which the military imposed on petitioner pending final military review of his conviction.

Following the order of the convening authority designating Fort Leavenworth as the place of confinement pending appellate review, petitioner filed a petition for a writ of habeas corpus in the United States District Court for the District of New Mexico (A. 3–15), challenging his proposed transfer to the Leavenworth Barracks and seeking to be released from the restraint of arrest in quarters, which had been ordered immediately following his conviction. The district judge held that a transfer to the Barracks at Fort Leavenworth "would, in effect, amount to execution of the sentence" (A. 19) prior to completion of appellate review, in violation of Article 71(c) of the Uniform Code of Military Justice, 10

[2] The issues on which review was granted are (1) whether the lower military tribunals properly held that it would not be a defense to a charge of wilfully disobeying orders to show that the Secretary of the Air Force had erroneously denied petitioner's application for separation from the service or reassignment on grounds of conscientious objection to the conflict in Vietnam, and (2) whether, if such a showing would have made out a defense, the Secretary of the Air Force had properly ruled that petitioner was disqualified from conscientious objector status because he has no conscientious objection to participation in war in general but only to the particular hostilities in Vietnam.

U.S.C. 871(c), and issued a judgment relieving petitioner from the transfer order. The court refused, however, to order petitioner's release from arrest in quarters, ruling that this was a matter for the exercise of discretion by the appropriate military authorities (A. 16–21). Thereafter, the Air Force rescinded the transfer order and directed that petitioner be placed under arrest in quarters in a room in the Visiting Officers Quarters at Cannon Air Force Base, under restrictions permitting him to leave the room, without escort, for certain routine activities (A. 32–34).

Cross-appeals were then taken from the unfavorable portions of the district court's order. The court of appeals held (A. 22–26) that the district court should not have entertained the action, since petitioner had not exhausted his available military remedies—*inter alia,* by challenging the restraint before a Board of Review, or filing a petition for habeas corpus in the United States Court of Military Appeals, pursuant to that court's recent decision in *Levy* v. *Resor,* 17 U.S.C.M.A. 135, 37 C.M.R. 399. The court of appeals accordingly reversed the district court's judgment granting partial relief to petitioner. This Court then granted certiorari to review that decision (A. 29).

SUMMARY OF ARGUMENT

I

This case may have become moot by operation of law. Petitioner's principal contention in applying for relief in the civilian courts was that his proposed

transfer to Fort Leavenworth would have constituted "execution" of his sentence to confinement at hard labor, forbidden by Article 71(c) of the Uniform Code of Military Justice until completion of appellate review of the underlying conviction. But it is doubtful whether there remains any live controversy between the parties on this question since petitioner's sentence to confinement at hard labor has now expired by operation of law, thus relieving him of any risk of premature "execution" of that sentence.

Article 57(b) of the Code directs that "any period of confinement included in a sentence of a court-martial begins to run from the date the sentence is adjudged * * *." As consistently interpreted by the courts and as implemented by military regulations, this Article means what it says: that a sentence to confinement begins to run from the date it is pronounced, irrespective of whether the accused is placed in confinement or is subjected to no restraint whatsoever. Petitioner so acknowledged in the district court.

Under the Code and the regulations, the sentence then runs continuously unless "suspended" or interrupted by culpable absence from confinement. As used in the Code, "suspension" of sentence refers only to the determination of a reviewing authority to place the accused in a formal probationary status, and the "suspension" can be revoked only for cause after a hearing. The decision in this case not to confine petitioner thus cannot be equated with suspension of his sentence for these purposes.

While the Manual for Courts-Martial and the regulations contemplate other situations in which the running of a sentence to confinement will be considered interrupted, these exceptions to the general rule prescribed by Congress purport to apply only when the accused secures his release from confinement by some misconduct or culpable error, like escape or fraud. This case presents no factors of this type which would sustain a conclusion that petitioner *should not* receive the credit generally required by Article 57(b).

At no time have we argued that the Court, or a Justice, or other federal judge is without authority to preserve judicial jurisdiction by tolling the running of a military sentence in order to avoid mootness. But respondents are uncertain whether such power was exercised in this case. The order entered by Mr. Justice Douglas two days before petitioner's sentence was to expire made no reference to the mootness problem; it dealt only with insuring petitioner's non-incarceration and his freedom from duties which might conflict with his conscience. The order, in form and substance, appeared to intend no more than to release petitioner on personal recognizance. In the absence of any express indication that respondents were authorized to treat petitioner's sentence as an exception to the general rule established by the Congress and Executive regulations, there may be no alternative to concluding that by force of law petitioner's sentence continued to run until it expired shortly thereafter. We emphasize, however, that the mootness of this case—which involves a collateral inquiry into whether certain re-

straint was unauthorized "execution" of a sentence now expired—would not affect petitioner's separate proceedings in the Court of Military Appeals to review his conviction. But when the underlying basis for *this* lawsuit ended, so in practical terms did the "case" or "controversy" between the parties.

II

The court of appeals properly held that the district court should have declined to entertain petitioner's action because he had failed to exhaust his military remedies. The exhaustion of remedies doctrine, which this Court in *Gusik* v. *Schilder,* 340 U.S. 128, held applicable to federal habeas corpus review of military courts-martial convictions, is equally appropriate where, as in this case, petitioner challenges only the type of restraint imposed upon him pending review of his conviction. Application of the exhaustion doctrine in the circumstances of this case not only serves to avoid unnecessary litigation in the federal courts to correct an alleged error which can be corrected by a military tribunal, but it also ensures that prior to disposition by civilian judges, who are unfamiliar with military discipline and the system of military justice, claims raising difficult and important problems of military law have been given the fullest opportunity for consideration and analysis by the tribunals which have been established exclusively to deal with them. Petitioner's opportunity in this case to test the legality of the type of restraint in a habeas corpus action in the Court of Military Justice was a prompt

and fully effective remedy. His failure to pursue that remedy before seeking federal habeas corpus relief justified the dismissal of the application.

III

If the Court decides to reach the underlying questions involved in the case, affirmance is nevertheless in order. The Code and the Manual for Courts-Martial contain clear authority for the order that would have transferred petitioner to Fort Leavenworth pending appellate review of his conviction.

The prohibition in Article 71(c) against "execution" of certain sentences to confinement prior to final appellate approval relates only to "carrying out" such sentences. But contemporaneous administrative construction, in the form of the Manual promulgated by the President and the regulations issued by the Service Secretaries, supported by judicial approval, demonstrates that this provision does not forbid all post-conviction restraint, including confinement, before the sentence may be "executed." Rather, military authorities are authorized to take appropriate steps to provide for the temporary custody of the accused during the interim, and this temporary custody may extend to a transfer to a United States Disciplinary Barracks. The critical circumstance underscoring the conclusion that such a transfer is not "execution" of a sentence to confinement at hard labor is that military regulations expressly direct that a person in confinement pending review may not be required to perform hard labor. In addition, while at Leavenworth pend-

ing review, petitioner would have retained his rank with the privileges and respect attendant to it.

Insofar as petitioner seeks to protest the propriety of the determination as to which form of restraint to impose, a long line of cases in this Court establishes that the civilian courts on habeas corpus are without jurisdiction to review an exercise of discretion in choosing among authorized alternatives as part of the court-martial process. Petitioner has at various times in this litigation conceded the key proposition that *some* post-conviction restraint is permissible, and thus there would appear to be nothing left to litigate in this proceeding. His concession is well founded, for the Code evidently contemplates such restraint, reasonable military regulations sanction it, and the Court of Military Appeals and the Court of Appeals for the Fourth Circuit have sustained it. Nothing in the Code requires that the sole criterion for post-conviction restraint be probable cause to believe the accused might flee. That standard would be narrower than that constitutionally applied after conviction in the civilian courts, and there is no basis for concluding that Congress intended to reduce the authority of military commanders to impose post-conviction restraints deemed appropriate under all the circumstances.

While this Court's decisions hold that the wisdom of a choice made within the court-martial process is not collaterally reviewable, we point out in any event that there is evidently ample justification for the imposition of restraint in this case. Petitioner's superiors were entitled to consider the nature of the offense,

the motive for it, petitioner's status as an officer, the location of the air base, and the effect of unrestrained movement on the efficiency and morale of the unit.

ARGUMENT

I

THE CASE MAY BE MOOT

Shortly before certiorari was granted, we filed a memorandum suggesting mootness. Although the Court did not direct that the issue be briefed, we, like petitioner (Brief pp. 69–74), believe that full discussion of the question at this stage is in order. While the Court may well conclude that our Suggestion of Mootness turned on an unduly technical interpretation of the release order issued by Mr. Justice Douglas, the following discussion is submitted to set forth, as part of the adversary process, the relevant factors relating to the existence and exercise of this Court's appellate jurisdiction under Article III of the Constitution.

1. Petitioner's sentence, including the term of confinement, was adjudged on March 9, 1968 (A. 31). Prior to filing his petition for a writ of certiorari in December 1968, petitioner applied to the Circuit Justice for release pending the disposition of the proposed petition. He indicated that the relief requested was necessary to prevent his challenge to restraint pending military review from becoming moot, in view of the fact that his one-year sentence, taking into account the time credited for good behavior, was due to expire on December 26, 1968. The government, re-

sponding to the application, acknowledged that, by virtue of the provisions of Article 57(b) of the Uniform Code of Military Justice, 10 U.S.C. 857(b), petitioner's sentence to confinement would indeed expire on December 26, 1968, thus rendering this action moot. We nonetheless opposed the granting of relief on the dual grounds that, under established law as settled by the Court of Military Appeals and the Fourth Circuit,[3] petitioner was not entitled to be released from arrest in quarters pending appellate review, and that, in any event, the underlying issue sought to be posed had little significance for the future in light of the intervening passage of amendments to the Uniform Code of Military Justice (effective August 1, 1969) providing for a procedure similar to bail for persons awaiting review of their court-martial convictions.

On December 18, 1968, the Circuit Justice denied the application. On December 24, 1968, Mr. Justice Douglas, to whom the application had then been referred, entered an order providing that, until the full Court had an opportunity to pass on the petition, "petitioner should be placed in a non-incarcerated status, which as the District Court said, should prevent his superiors from 'assigning the plaintiff to combat activity or requiring him to perform duties whereby he will be perhaps faced with the necessity of a General Court Martial or other proceedings that might injure

[3] *Levy* v. *Resor*, 17 U.S.C.M.A. 135, 37 C.M.R. 399; *Levy* v. *Resor*, 384 F. 2d 689 (C.A. 4), certiorari denied, 389 U.S. 1049.

him as a practical matter'" (A. 28).[4] The Court, in granting certiorari on January 20, 1969, continued the stay granted by Mr. Justice Douglas.

2. The contention decided in petitioner's favor in the district court, which the court of appeals then held should not have been entertained, was his assertion that the proposed transfer to Fort Leavenworth would constitute unlawful premature "execution" of his sentence to confinement. Thus, the linchpin of this issue is what constitutes "execution" of a sentence as that term is used in the Uniform Code of Military Justice. It would seem to follow that once the sentence to confinement has expired, the question of what forms of restraint may be considered "execution" of the sentence becomes academic. The possibility that the present case may have become moot, in the sense that the basis for the underlying dispute has disappeared, arises from Congress's provision in military law for a unique principle for computing the commencement

[4] The language quoted by Mr. Justice Douglas appeared in a temporary restraining order, later vacated for want of jurisdiction, issued by a district judge in petitioner's *prior* action seeking review of the Air Force's refusal to release or reassign him as a conscientious objector (A. 48–50). In the present context, petitioner would not have been assigned to duties inconsistent with his claimed conscientious objection even had Mr. Justice Douglas not so ordered. Under military law, a person in arrest status, as petitioner was at the time of the release order, cannot be assigned military duties involving command or the bearing of arms. Manual For Courts-Martial, United States, 1951 [hereinafter Manual], para. 20a. Furthermore, under Air Force regulations, an officer sentenced to dismissal by court-martial is automatically disqualified from flying status. Air Force Manual 35–13, para. 2–29(h).

and duration of a court-martial sentence to confinement.

Article 57(b) of the Uniform Code of Military Justice (10 U.S.C. 857(b)), provides:

> Any period of confinement included in a sentence of court-martial begins to run from the date the sentence is adjudged by the court-martial, but periods during which the sentence to confinement is suspended shall be excluded in computing the service of the term of confinement.

This statute has consistently been interpreted as requiring "that an accused receive credit against a sentence to confinement for time served from the date the court-martial adjudged sentence instead of some later date when punishment was approved by reviewing authority." *United States* v. *Bryant,* 12 U.S.C. M.A. 133, 138. Indeed, in a case in which the convening authority reduced a sentence of a bad conduct discharge to confinement for four months, the Court of Military Appeals ruled that by operation of law under Article 57(b) the new confinement term had to be deemed to have begun to run on the date the accused had been *sentenced* by the court-martial to a punitive discharge. *United States* v. *Brown,* 13 U.S.C. M.A. 333, 32 C.M.R. 333.

Military courts and the military authorities have thus understood Article 57(b) as commanding the general rule that an accused be considered "serving" a sentence to confinement irrespective of whether he is, or can be, ordered to execute the confinement por-

tion of his sentence or whether he is subject to any restraint; credit accrues even where he is assigned to normal duties pending review. Indeed, respondents are governed by interpretive regulations jointly promulgated by the Secretaries of the Army and the Air Force which direct: [5]

> 4. OPERATION OF SENTENCES. *a. Beginning date.* The date the sentence of a court-martial is adjudged will mark the beginning of a sentence to confinement *whether or not the accused had then been placed in confinement* [emphasis added].

Thus, correctly understanding the computation of a military sentence under the code, petitioner's counsel stated to the district court at the hearing on the habeas corpus application: "Captain Noyd's one-year sentence began to be served on March the 9th" (Tr. 25), the date it was adjudged.

This is, of course, contrary to the rule which prevails with respect to criminal sentences in the federal courts, see 18 U.S.C. 3568.[6] It is this less-lenient rule that petitioner argues (Pet. Br. pp. 62–64, 71–72) should here be adopted, so that periods not spent in confinement will not count toward the service of a military sentence and that release from any restraint will automatically operate to toll the running of a

[5] Apprehension and Confinement: Military Sentences to Confinement, AR 633–30; AFR 125–30.

[6] Congress has expressly provided in this section that the traditional federal rule does *not* apply to sentences for offenses tried by court-martial.

sentence under Article 57(b).[7] But the legislative history cited by petitioner precludes such an interpretation, requiring instead the interpretation given to it by the military authorities. Thus, it was specifically explained that:

> Subdivision (b) requires a sentence of confinement to begin to run on the date that it is adjudged even though the accused is not actually in confinement, unless the sentence is suspended.

[7] This contention can only be termed remarkable, since its acceptance would mean that petitioner would be liable to serve not just the two days the Air Force considered unexpired when the release order was entered, but the entire one-year prison sentence. This is so because petitioner has *never* been in "confinement" as that term is defined in the Code and the Manual. Rather, as he averred in the district court (A. 4; Tr. 14, 16), he has been subject to the lesser restraint of "arrest in quarters", the status that continued until the entry of Mr. Justice Douglas' order (see A. 32–34). As used and understood in military law, the concept of "arrest" differs critically from "confinement" in that arrest is simply the *moral* restraint flowing from a serviceman's duty to obey an order restricting his conduct, while confinement is the *physical* deprivation of his freedom. See Code Art. 9(a), 10 U.S.C. 809(a); Manual, paras. 18, 20. Petitioner has at no time been in "confinement."

He is also in error in contending that the absence of confinement precluded his accumulation of good-conduct abatement of part of his sentence. The Judge Advocate General of the Air Force ruled that under "Department of Defense Instruction No. 1325.4 on Uniform Policies and Procedures Affecting Military Prisoners and Places of Confinement", AF Manual 125-2 (Attachment 2, pp. 16–17), persons in a status like petitioner's should be considered accruing good time credit. This advice did nothing more than confirm what petitioner already knew, since his counsel, during the hearing on his habeas corpus application barely two months after the conviction, advised the court that good time credit was being accumulated (Tr. 25). It was on that understanding that petitioner raised the mootness possibility before this Court.

Hearings on H.R. 2498 Before a Subcommittee of the House Armed Services Committee, 81st Cong., 1st Sess., pp. 1089–1090; H. Rep. No. 491, 81st Cong., 1st Sess., p. 27.

Nor can these express disclaimers be deprived of meaning by giving the exception for a "suspended sentence" the expanded scope petitioner suggests (Br. p. 59). A suspended sentence in military law, as in civil, refers to a determination placing a defendant on probation—a status which may be revoked only for cause after a formal hearing. Code Arts. 71, 72, 74, 10 U.S.C. 871, 872, 874; Manual, paras. 88e, 97a, 97b; *United States* v. *May*, 10 U.S.C.M.A. 358. Release from some form of restraint pending completion of military review no more constitutes "suspension" of the sentence as the term is used in the Code than does the decision not to impose any restraint during that period. Hence, the stay granted in this case, whatever its effect, did not serve to "suspend" petitioner's sentence.[8]

3. At first blush, allowing credit on a military sentence from the date the sentence is adjudged may seem overly generous in the situation where the convicted accused is not placed in any "confinement" (or even arrest) pending appeal. Apart from the fact

[8] The Uniform Code expressly provides only one other way in which a sentence to confinement may be tolled. That occurs under Article 14, 10 U.S.C. 814, whenever a prisoner serving a sentence imposed by a court-martial is delivered to civilian authorities and is thereafter convicted of a crime in a civil court. The interruption of the military sentence persists until the prisoner is returned to military custody to complete his sentence.

that this is a judgment that Congress itself has conclusively made, however, this aspect of the statute has a demonstrably rational basis. First, the military has a substantial interest in the rapid rehabilitation of its members and their restoration to duty. See Hearings, *supra*, p. 1093. Second, such a provision for maximizing credit also serves to ameliorate somewhat the fact that, under the Uniform Code of Military Justice, all sentences must be served *consecutively*. See *United States* v. *Bryant*, 12 U.S.C.M.A. 133, 30 C.M.R. 133. Third, Congress may have taken into account the fact that persons sentenced to short terms of confinement could, unless given credit on their sentences from the date of adjudication, be made to remain in the armed forces pending the outcome of appellate review periods, and thus be compelled to serve their sentences after expiration of their normal term of service in the armed forces. See *Kahn* v. *Anderson*, 255 U.S. 1; Manual, para. 11(d).[9]

[9] As we noted in our responses to the application for a stay and the petition for certiorari, the Military Justice Act of 1968 (82 Stat. 1335) *inter alia* amends Article 57(b), effective August 1, 1969, so as to provide for a system whereby the officer having jurisdiction over a person convicted by general court-martial will have the power "in his sole discretion [to] defer service of the sentence to confinement", in which event the sentence will not run until it is ordered executed (82 Stat. 1341). This change was rather clearly based on the congressional understanding that "a sentence to confinement begins to run from the date it is adjudged" and that the requirement that a "suspension" of sentence can be vacated only after a hearing for cause means this procedure "cannot, therefore, be used effectively as a means of release pending appeal." S. Rep. No. 1691, 90th Cong., 2d Sess., p. 13. Under the new provision, the "de-

4. Our view that this proceeding became moot was not predicated on any disagreement with petitioner (see Pet. Br. pp. 70–71) over this Court's power to preserve the *status quo* pending review. Our suggestion of mootness rested merely on our belief that the order actually entered in this case by Mr. Justice Douglas did not toll the congressionally prescribed running of petitioner's sentence so as to preserve a live controversy between the parties over whether restraint constituted "execution" of the sentence. We have seen that Article 57(b) of the Code provides as a general rule for the running of a sentence to confinement from the date it is adjudged, irrespective of execution of the sentence or other restraint, and of course, in the absence of supervening authority, respondents must follow that command and the implementing regulations of the Secretary of the Air Force. The order entered in this case two days before the confinement sentence was to expire merely quoted from an order entered in another litigation with different issues, directing only that petitioner not be incarcerated or assigned to duties uncongenial to his conscience. Mr. Justice Douglas opinion and order (A. 27–28) nowhere referred to the prospective mootness of the case, but seemed concerned on its face

---

ferment would be terminated and the sentence would begin to run automatically when the sentence is approved upon review and ordered executed." *Id.*, p. 14. This amendment would be superfluous if petitioner is correct in contending that Article 57(b) *currently* regards a sentence to confinement as tolled whenever the convicted accused is allowed to remain free from arrest or confinement pending appeal or is at some point during review released from restraint.

solely with, in effect, enlarging petitioner on personal recognizance pending action by the full Court. We regard it as questionable whether, under the system of military law ordained by Congress, that this "order of release" automatically operated to stay the sentence under Article 57(b) of the Code.

Nor does paragraph 97c of the Manual for Courts-Marital warrant that result.[10] That paragraph provides in pertinent part:

> *Interruptions of execution of a sentence.*—A sentence to confinement * * * is continuous until the term expires, with certain exceptions. These exceptions include the following:
>
> * * * * *
>
> Periods during which the person undergoing such a sentence is absent without authority, or is absent under a parole which proper authority has suspended and later revoked, or is erroneously released from confinement through misrepresentation or fraud on the part of the prisoner, or is erroneously released from confinement upon his petition for a writ of habeas corpus under a court order which is later reversed by a competent tribunal, shall be excluded in computing the service of the term of the punishment.

Accord, AR 633–30, AFR 125–30, ¶ 5. As petitioner states, the provisions of paragraph 97c are designed to supplement the basic principles of Article 57(b), in

[10] The Manual was promulgated by the President pursuant to the Code's authority to prescribe implementing rules and procedures. See Art. 36, 10 U.S.C. 836; *United States* v. *Augenblick*, 393 U.S. 348, 352.

light of the fact that "Congress did not mention all contingencies which would prevent an accused from being credited with time served." *United States* v. *Bryant,* 12 U.S.C.M.A. 133, 137, 30 C.M.R. 133, 137. Petitioner contends that the instances enumerated in paragraph 97c, *supra,* show "that the rationale of 97c is that a military prisoner who has been freed from confinement may not receive credit for time served during the period of his release" (Pet. Br. p. 72).

Neither respondents nor other military authorities, however, have ever pressed for such a sweeping restriction on the policy established by Congress in Article 57(b) of the Code. Paragraph 97c simply reflects a recognition of the type of circumstances, deemed implicit in Article 57(b), in which a military prisoner does not *deserve* to be credited with service of his sentence. Because these situations are exceptions to the general rule provided by Congress, they are necessarily limited in scope. Furthermore, they differ qualitatively from the circumstances of this case. The focus of the paragraph is, as its caption indicates, interruptions in the "execution" of a sentence, and as we show in Point III, *infra,* petitioner has not been ordered into the execution of his sentence. But more importantly, while we agree with petitioner that the examples may not be exhaustive, they demonstrate that the present situation is not *ejusdem generis.* The examples cited in the paragraph—which include escape, securing of freedom through fraud, and the obtaining of release from physical custody pursuant to an erroneous, subsequently reversed, court order on a petition for habeas corpus—clearly indicate that the

running of a military sentence should be deemed tolled only when the prisoner's freedom is secured by some wrongful or erroneous action. Indeed, in *Bryant, supra,* on which petitioner relies, the Court of Military Appeals went only so far as to say that Article 57(b) "does not state that a sentence once started may not be interrupted by the misdeeds of the accused." 12 U.S.C.M.A. at 138, 30 C.M.R. at 138. Although we opposed petitioner's release from restraint pending review of his certiorari petition, the granting of his request cannot in any relevant sense be said to have been either culpably wrongful or legally erroneous.

Paragraph 97c thus does not support an interpretation of Article 57(b) as depriving a prisoner of the automatic running of his sentence whenever he is ordered released from restraint by a court or is allowed by his commanding officer to remain under no restraint pending appeal.

5. If we are correct in believing that petitioner's sentence to confinement continued to run until it expired on December 26, 1968, and petitioner is thus no longer amenable to any confinement under his court-martial conviction, it is clear there is no longer any live dispute over whether the degrees of restraint to which he was subjected constituted premature "execution" of his sentence.[11] In the practical, concrete terms

[11] The question whether similar restraints would or would not be authorized for a person who no longer faces any prison sentence is not presented by the facts of this case. As petitioner states (Pet. Br. p. 73), he has now been restored to duty as Special Assistant to the Wing Commander.

which are the essence of a "case" or "controversy," neither that issue nor the exhaustion question has any significance for petitioner. The sentence which underlay the legal dispute has now terminated, leaving nothing more than a "speculative possibility" that petitioner could be adversely affected by dismissal of this suit as moot. See *Carroll* v. *President and Commissioners of Princess Anne County*, 393 U.S. 175, 178; *Bus Employees* v. *Missouri*, 374 U.S. 74, 78.[12] Nor is it pertinent to speculate about restraint after *another* court-martial (Pet. Br. pp. 73–74). Not only would such theoretical contingencies fail to establish the "sufficient immediacy and reality" warranting the relief now requested, *Golden* v. *Zwickler*, No. 370, O.T., 1968, decided March 4, 1969, but the possibility that petitioner would, or could, again be assigned to duties he might find in conflict with his conscience may fairly be termed minute (see note 4, *supra*).

6. We concede that the preceding argument is a technical one; that petitioner was seeking an order that would preserve the issue he sought to present; and that there is some indication Mr. Justice Douglas intended to prevent mootness and not just to provide interim relief. Since we have not suggested that a Justice of this Court, or any federal judge, is powerless to interrupt the running of a military sentence, we do not deny that Mr. Justice Douglas had the power to grant the relief requested. We are simply in

[12] Of course the separate proceedings to review the court-martial conviction itself do not suffer from this defect. See *Carafas* v. *LaVallee*, 391 U.S. 234; *Peyton* v. *Rowe*, 391 U.S. 54.

doubt (a) whether he did intend to toll the running of the sentence, and (b) whether the order entered authorizes respondents to treat petitioner's sentence as unexpired, notwithstanding Article 57(b) and Air Force regulations. Compare *International Longshoremen's Ass'n, Local 1291* v. *Philadelphia Marine Trade Ass'n*, 389 U.S. 64, 73–76. Should the Court interpret the order of December 24, 1968, as sufficiently manifesting an intention to direct respondents not only to release petitioner and keep him from conscience conflicts, but also to treat his unexpired sentence as tolled, then we would concede that the case has not become moot.

II

THE COURT OF APPEALS PROPERLY DETERMINED THAT THE DISTRICT COURT SHOULD NOT HAVE EXERCISED JURISDICTION OVER THE PRESENT ACTION BECAUSE PETITIONER FAILED TO EXHAUST HIS MILITARY REMEDIES

Although the doctrine of exhaustion of remedies is not a jurisdictional bar to consideration of a habeas corpus action (see *Fay* v. *Noia*, 372 U.S. 391, 426–434), the rule serves as a useful procedural safeguard in our federal system against the friction which would result if a federal court were to entertain an action on the merits or grant relief where adequate remedies exist in a local forum. In *Gusik* v. *Schilder*, 340 U.S. 128, which involved an attack upon a court-martial conviction for murder, this Court held that the doctrine of exhaustion of military remedies applies to habeas corpus actions by military prisoners. The Court found that the rationale of the exhaustion doc-

trine was as pertinent in cases of collateral attack by military prisoners as it was in federal habeas corpus proceedings by State prisoners (340 U.S. at 132):[13]

> If an available procedure has not been employed to rectify the alleged error which the federal court is asked to correct, any interference by the federal court may be wholly needless. The procedure established to police the errors of the tribunal whose judgment is challenged may be adequate for the occasion. If it is, any friction between the federal court and the military or state tribunal is saved. * * * Such a principle of judicial administration is in no sense a suspension of the writ of habeas corpus. It is merely a deferment of resort to the writ until other corrective procedures are shown to be futile.

Petitioner takes the position, through various arguments, that the exhaustion of remedies doctrine is inapplicable in this case because the instant action, unlike *Gusik*, does not challenge the conduct of his court-martial proceedings, but the legality of the type of restraint imposed on him pending review of his conviction. We submit, however, that sound policies of judicial administration support the exhaustion requirement in cases arising from the military justice system, and those policies fully justify the decision below.

---

[13] In *Gusik*, the policy against premature consideration of military claims by the federal courts was held to warrant application of the exhaustion doctrine even though the military remedy to which the Court held resort should be had, a motion for a new trial, did not exist at the time the habeas corpus action was filed and decided in the district court.

1. Petitioner argues initially that this case is within the exception to the exhaustion requirement in cases where the habeas corpus action challenges the right of military authorities to exercise any court-martial jurisdiction over the accused. See *United States* v. *McElroy*, 259 F. 2d 927 (C.A.D.C.), affirmed *sub nom. McElroy* v. *Guagliardo*, 361 U.S. 281; see also *Toth* v. *Quarles*, 350 U.S. 11; *Reid* v. *Covert*, 354 U.S. 1. We do not understand petitioner to contend, however, that his court-martial lacked *in personam* "jurisdiction" as that concept was applied in those cases.[14] It may be appropriate to suspend the exhaustion requirement in the relatively few cases where the petitioner collaterally attacks his confinement on the ground that he is not subject to any military authority and cannot be proceeded against in a court. But a claim that military authorities have erred in the application of military law, which is involved in this case, is not equivalent to an assertion

[14] It is therefore difficult to understand the formulation of the issue involved here, in Mr. Justice Douglas' memorandum order granting petitioner's application for release, as "whether the doctrine of exhaustion of military remedies applies where the question is whether the court martial authority acts outside its jurisdiction" (A. 28). Of course, the concept we are considering here with respect to the exhaustion doctrine is jurisdiction "in the traditional sense" (see Brief for the United States, pp. 49–54, *United States* v. *Augenblick*, No. 45, this Term), and must be distinguished from the expansive "jurisdiction" concept which served a transitional role in the enlargement of federal habeas corpus review of State convictions, see *Johnson* v. *Zerbst*, 304 U.S. 458.

of lack of any authority over the defendant;[15] such claims should be adjudicated in the first instance by the tribunals which were established exclusively to rule on them. Unless challenges to the type of custody or to the conduct of the conviction proceedings, which are necessarily present in *all* habeas corpus actions, are to be treated as equivalent to an assertion of lack of jurisdiction itself—and the exception to the exhaustion requirement thus permitted to devour the rule—the claim for relief in the present case clearly does not come within the "jurisdiction" exception.[16]

[15] Thus there is no conflict, as alleged by petitioner (Pet. Br. pp. 42–43), between the position taken by the court below and the established procedure permitting challenges to the validity of an induction order by bringing habeas corpus in a federal court immediately after submitting to induction. See, *e.g.*, *Eagles* v. *Samuels*, 329 U.S. 304; *Oestereich* v. *Selective Service Board*, 393 U.S. 233, 235–236 n. 5.

[16] Nothing in *Gallagher* v. *Quinn*, 363 F. 2d 301 (C.A.D.C.), certiorari denied, 385 U.S. 881, relied on by petitioner (Pet. Br. p. 26), is to the contrary. That case was not a habeas corpus attack on military jurisdiction, as petitioner's argument would indicate, but rather a civil injunction action brought by a discharged enlisted man whose petition for review of his court-martial conviction had previously been denied by the Court of Military Appeals; he claimed that that court had no power to refuse to hear his case and sought an injunction requiring the Court of Military Appeals to review his conviction on the merits. The federal court of appeals held that the federal courts had jurisdiction to entertain the contention that the statute granting the Court of Military Appeals discretion to deny review to him was unconstitutional, specifically noting that all "[o]ther remedies available afford no authority to anyone to grant the only relief he seeks in this litigation." 363 F. 2d at 304 n. 9. The court affirmed the district court's dismissal of the complaint.

Indeed, in his habeas corpus petition in the district court, petitioner did not make his present contention, but instead asserted that "on information and belief [he had] exhausted all effective military remedies" (A. 12).

Petitioner also contends that application of the exhaustion doctrine by the federal courts is appropriate only with respect to State proceedings in the interest of comity, but not with respect to military remedies because both the federal courts and the Armed Forces are agencies of the same sovereignty. But although inter-governmental confrontation is not involved where military custody is challenged, petitioner's argument ignores other policies which justify the rule in *Gusik* v. *Schilder, supra,* that military remedies must be exhausted before the federal courts will exercise their jurisdiction on habeas corpus. In the first place, the application of the exhaustion doctrine to military proceedings serves the same important pragmatic interest as its application to federal administrative proceedings: decreasing the volume of litigation in the courts by allowing the military to correct errors through its own internal review processes. Where full relief may promptly be obtained in the military courts, it makes good sense for the civilian court to encourage resort to that remedy, and discourage premature habeas corpus litigation, by declining to entertain the case on its merits.

More importantly, application of the exhaustion doctrine in cases of this type ensures that the federal civilian courts, which have ultimate jurisdiction to

rule on the legal issues presented by military prisoners, will have the fullest advantage of the expertise and the analysis of the military tribunals on those issues. This Court has recognized that the exercise of military authority and the system of military justice involve concepts and practices which differ significantly from other governmental functions and from the common law traditions of the federal courts (see *Burns* v. *Wilson,* 346 U.S. 137, 140; *Orloff* v. *Willoughby,* 345 U.S. 83, 94). The fact that federal judges are unlikely to have any significant familiarity with military law and military society strongly supports this Court's holding in *Burns* v. *Wilson, supra,* that the federal civilian courts should defer to the decisions of military tribunals when it appears that the military justice system has afforded full and fair consideration of the issues (see also *Whelchel* v. *McDonald,* 340 U.S. 122, 124; *United States* v. *Augenblick,* 393 U.S. 348, 352). The policies which underlie this deference, which results in a narrower scope of review on federal habeas corpus of military courts-martial than of State criminal convictions, similarly suggest that questions of military law which may be raised in the civilian courts should be presented fully in the first instance to the military tribunals.

The issues involved in this action, which challenges the type of restraint imposed on petitioner rather than the conduct of his court-martial proceedings, present a particularly strong case for application of the exhaustion requirement. Although all such challenges would not be cognizable in the civilian courts (see pp. 45–49, *infra*), the questions of law which

would be at issue in those courts involve, as we detail in Part III, a number of technical provisions of the Uniform Code of Military Justice and the Manual for Courts-Martial; and, under petitioner's argument, challenges to the type of restraint presumably could be raised at any time in the process, from before conviction until the sentence is fully served. The problem of what constitutes an "execution" of sentence, involved in this case, for example, presents the federal habeas corpus court with novel issues arising in an unfamiliar system and frequently requiring the application of special military considerations to the narrow facts of a particular case. Sound judicial administration counsels against the rule urged by petitioner, which would engage the federal courts in such an exercise while there remain adequate military remedies which, at the least, would provide additional opportunity for analysis of the issues and a further sifting of the facts.

While petitioner contends that the Court of Military Appeals would be overwhelmed with habeas corpus applications under the government's submission, he makes no showing that the court has been in any way burdened by such applications in the twenty months since it announced its willingness to entertain motions for collateral relief. The short answer to petitioner's argument is that any difficulty which the Court of Military Appeals might encounter at some future time in handling extraordinary writs may be inquired into, in a particular case, on the question whether the military remedy is prompt and adequate. Petitioner's

conjecture is not an adequate reason at this time for inviting the federal courts to become courts of first resort on questions of military custody.

2. The court of appeals in the present case found that petitioner had not exhausted his military remedies through his failure to seek habeas corpus in the Court of Military Appeals (A. 26).[17] In July 1967, nearly a year before the instant federal habeas corpus action was begun, the Court of Military Appeals unanimously held that it had the power to issue such a writ in an appropriate case to relieve a military defendant of illegal restraint pending review of a court-martial conviction. *Levy* v. *Resor*, 17 U.S.C.M.A. 135, 37 C.M.R. 399. And more recently, in *United States* v. *Bevilacqua*, 18 U.S.C.M.A. 10, 12, 39 C.M.R. 10, 12,

[17] The court also found that presentation of petitioner's habeas corpus contentions in the court-martial appeal proceeding, which the court incorrectly understood was then pending before the Air Force Board of Review, was a viable military remedy (A. 26 and n. 4). While we believe that a habeas corpus application in the Court of Military Appeals constituted petitioner's most effective and expeditious remedy, and thus confine our discussion to the failure to exhaust that avenue, we agree with the court below that resort to the Board of Review would also have afforded effective relief. See cases cited at A. 26 n. 4. The sole basis of petitioner's opposition is apparently that review of the restraint issues on the appeal of the conviction would have taken too long (Pet. Br. pp. 27–29). However, there is no reason why expedition as to the collateral issue of petitioner's restraint could not have been sought and granted by the Board of Review. There is no basis for assuming, in the absence of any such attempt by petitioner, that the time consumed by the Air Force Board of Review on this issue would have been excessive or taken longer than recourse to the federal courts. See *United States* v. *Lucero*, 18 C.M.R. 942.

the same court stated that "an accused who has been deprived of his rights need not go outside the military justice system to find relief in the civilian courts of the Federal judiciary." See also *United States* v. *Augenblick*, 393 U.S. 348, 350, describing the habeas corpus jurisdiction of the Court of Military Appeals as affording an "additional remedy, apparently now available."

Petitioner does not contend that the relief available in the Court of Military Appeals would be any less comprehensive than the remedy which he sought in the district court. Nor is it argued that any delay in ruling on the application would render the military remedy significantly less effective than the civil writ.[18] Petitioner does suggest, however, with some deference to the good faith of the Court of Military Appeals (Pet. Br. pp. 35–37), that relief in that court is presently inadequate because, in the few cases on extraordinary writs presented to it to date, the court has not yet granted relief. A reading of the cases cited by petitioner, however, does not reveal any hesitancy to vindicate the rights asserted, but rather shows that

[18] In *Levy* v. *Resor*, 17 U.S.C.M.A. 135, the petition was filed on June 20, 1967, and, after hearing oral argument, the Court of Military Appeals filed its written opinion on July 7, 1967. The petition in the present case was filed in the district court on May 16, 1968, and the district court announced its decision orally on May 23, 1968, after a hearing on that date. Petitioner also notes (Pet. Br. p. 36 n. 17) that a subsequent habeas corpus application by Captain Levy challenging his transfer to Fort Leavenworth after that transfer had been approved by the Fourth Circuit (*Levy* v. *Resor*, 384 F.2d 689, certiorari denied, 389 U.S. 1049), was ruled on, and denied, by the Court of Military Appeals within five days after it was filed.

the applications in those cases were properly denied on their facts. Although the Court of Military Appeals, in *Levy* v. *Resor*, 17 U.S.C.M.A. 135, had decided, adversely to petitioner, the basic question of the power of the military to place a convicted defendant under some sort of restraint pending review of his court-martial, the court there declared itself willing and able to review particular claims that the type of confinement imposed was unlawful. See also *United States* v. *Bevilacqua*, 18 U.S.C.M.A. 10, 39 C.M.R. 10. But even if petitioner believed that he had no chance of obtaining relief on the facts of this case, that would not excuse his failure to pursue the remedy. *Gusik* v. *Schilder, supra*, 340 U.S. at 133.

Finally, the court below correctly held that the exhaustion doctrine was applicable even though the present action did not challenge the underlying conviction but rather the type of restraint imposed pending appellate review (A. 26). Indeed, the fact that this issue is incidental to a court-martial proceeding under military jurisdiction would seem to render resort to military remedies particularly appropriate. See *Orloff* v. *Willoughby*, 345 U.S. 83, 94; *Beard* v. *Stahr*, 370 U.S. 41. This Court has held that the exhaustion doctrine is applicable in the comparable situation where bail in respect of a pending criminal prosecution is sought in the federal courts. *Stack* v. *Boyle*, 342 U.S. 1, 6–7; compare *Dawkins* v. *Crevasse*, 391 F. 2d 921 (C.A. 5) (bail sought in federal court only after State court remedies exhausted). Similarly, the Tenth Circuit has held that the failure to exhaust military remedies precluded federal habeas

corpus relief to a military prisoner who alleged that his second court-martial trial would place him in double jeopardy. *Gorko* v. *Commanding Officer*, 314 F. 2d 858 (C.A. 10). The court held that the petitioner had an adequate opportunity to present that claim to the military courts in the court-martial proceeding. So also here, the Court of Military Appeals, which clearly would have had jurisdiction to entertain the present action, could have given full and adequate consideration to petitioner's claims of unlawful restraint pending appellate review of his conviction. By neglecting to pursue that opportunity for satisfactory disposition of his complaint by the military courts, petitioner rendered the present habeas corpus action premature for federal-court disposition on the merits. *Gusik* v. *Schilder*, 340 U.S. 128; see *Beard* v. *Stahr*, 370 U.S. 41; *Orloff* v. *Willoughby*, 345 U.S. 83, 94.[19]

[19] There is no merit to petitioner's further contention (Pet. Br. pp. 29–30) that exhaustion was not required, under *Oestereich* v. *Selective Service Board*, 393 U.S. 233, because the action of the military in seeking to transfer petitioner pending completion of appellate review to the Disciplinary Barracks at Fort Leavenworth constituted a "clear departure * * * from * * * statutory mandate." As we shall show in Part III, *infra*, any violation of the Uniform Code of Military Justice in this regard was hardly "clear". Compare *Clark* v. *Gabriel*, 393 U.S. 256. Moreover, *Oestereich* did not involve application of the general doctrine of exhaustion of remedies (see 393 U.S. at 246–250 (dissenting opinion)), but rather the interpretation of a particular Congressional enactment providing that there could be no pre-induction judicial review of a Selective Service classification. The principles laid down in *Oestereich* to deal with that special statute are thus not applicable here. See Brief for the United States, pp. 13–14 & nn. 6–7, 24–25 n. 14, *McKart* v. *United States*, No. 403, this Term.

III

THE UNIFORM CODE OF MILITARY JUSTICE AND THE MANUAL FOR COURTS-MARTIAL AUTHORIZED IMPOSITION OF RESTRAINT UPON PETITIONER PENDING APPELLATE REVIEW OF HIS COURT-MARTIAL CONVICTION

If the Court concludes that the case is not moot and that attention to petitioner's claims was inappropriately declined below for failure to resort first to military remedies, the Court could remand the case to the court of appeals for consideration on the merits. We believe, however, that final action by this Court would be both permissible and proper. In addition to the district court below, several other courts have addressed themselves to the questions that remain in the present case. *E.g., Levy* v. *Resor,* 17 U.S.C.M.A. 135, 37 C.M.R. 399; *Levy* v. *Resor,* 384 F. 2d 689 (C.A. 4), certiorari denied, 389 U.S. 1049; *Levy* v. *Dillon,* 286 F. Supp. 593 (D. Kan.), appeal pending (C.A. 10). Furthermore, since the direct proceedings reviewing petitioner's court-martial conviction have now reached their final stages before the Court of Military Appeals, speedy resolution of the collateral issues here involved would seem in order.

The habeas corpus petition in the district court made two contentions: that the proposed transfer to Fort Leavenworth pending completion of appellate review was illegal (A. 11; see A. 18, 20); and that any

continued restraint was improper (A. 12–13; see A. 18–19).[20]

A. THE PROPOSED TRANSFER TO FORT LEAVENWORTH WAS LEGAL

The issue of the proposed transfer to Fort Leavenworth remains in this case only insofar as petitioner relies on the allegedly "clear" invalidity of that order as justifying his failure to exhaust administrative

[20] This latter contention was based in part on petitioner's argument (A. 7–10, 13; Pet. Br. pp. 64–69) that the restraints pending appeal denied him due process because at no time before or during his court-martial was he permitted to defend on the basis of his theory that the allegedly erroneous refusal of the Secretary of the Air Force to grant relief on account of petitioner's "selective conscientious objection" constituted a defense to the charges. Petitioner asserts that when he attempted to challenge the Secretary's action in a civil proceeding, the Solicitor General represented to this Court that petitioner could raise this claim as a defense to a court-martial. This is not so. Our response was only that the contention should first be *raised* within the military trial system to give those courts the initial opportunity to decide *whether* allegedly erroneous action by the Secretary of the Air Force should be recognized as an excuse for disobeying certain orders. (See Memorandum for the United States in Opposition, pp. 7–8 n. 4, No. 722, O.T. 1967.) That precise question is now before the Court of Military Appeals on review of petitioner's court-martial conviction. Review of that question by this Court at this time is plainly premature. *Gusik* v. *Schilder*, 340 U.S. 128.

That military courts have held (thus far, at least) that petitioner's claim is *not* a legitimate defense is quite different from denying him the opportunity to raise and litigate a defense cognizable in law. Due process is not offended by imposing restraint on a defendant convicted in a civilian court while he seeks to convince a reviewing court that his claims were improperly rejected below. There is even less foundation for an allegation of denial of due process in the present case.

remedies (Pet. Br. pp. 29–30, 53 n. 23).[21] The argument is self-defeating, however, for as the court below noted (A. 26 and n. 4), claims of illegal, premature "execution" of military sentences can be speedily passed upon by the military courts, and the more clear the alleged violation the less reason, it would appear, for carrying the complaint outside the traditional channels Congress has prescribed for the supervision of military justice. But, as the following discussion will show, the alleged violation was anything but "clear"; indeed, we believe an informed understanding of the terms and concepts of the Uniform Code will show that there was no violation at all. At the very least this discussion will underscore the propriety—in the military justice field no less than in the field of administrative regulation—of resorting first to the expert tribunals conversant with the entire complex of statutes and regulations. In the event the Court concludes that the question should be decided in the present context *de novo*, without the benefit of the analysis of the specialized court created by Congress and entrusted with the primary responsibility for interpreting the Uniform Code, we shall endeavor to expose the logical flaw in petitioner's contention that any transfer to Fort Leavenworth must, "in effect, amount to execution" (A. 19) of his sentence to hard labor.

[21] Only prisoners with more than six-months confinement left to serve may be committed to a disciplinary barracks. See AF Manual 125–2, ¶ 6–8.

Article 71(c) of the Uniform Code provides:

> No sentence which includes, unsuspended, a dishonorable or bad-conduct discharge, or confinement for one year or more, may be executed until affirmed by a board of review and, in cases reviewed by it, the Court of Military Appeals.

Neither the Code nor the Manual, however, defines what is meant by "execution" of a sentence. The board of review cases catalogued by petitioner (Br. pp. 50–53) do not illuminate the question because in each of those instances—all arising in the early 1950's shortly after the enactment of the Code—the convening authorities, unfamiliar with Article 71(c)'s broadening of the categories of sentences which could not be executed immediately, had actually directed that lengthy confinement sentences or punitive discharges be "executed." In no case was there a question whether restraint pending appellate review constitutes "execution" of a sentence to confinement.

The only authority cited by petitioner (Br. p. 55) as defining the term "execution" as used in military law, *Sweet* v. *Taylor*, 178 F. Supp. 456, 460 (D. Kan.), though arising in a distinguishable context,[22] states a workable definition: "To execute means to carry out, to perform," and we agree to its relevance. In this light, it becomes evident that the proposed transfer

[22] *Sweet* involved a pre-Code offense, trial, and review; the question was whether under reviewing authorities' power, pursuant to a 1926 Manual, to "execute" a sentence, they could alter the type of institution in which the accused had been sentenced to be confined so as to change his confinement from a reformatory to a penitentiary.

would not have "carried out" or forced petitioner to "perform" his sentence to be confined at hard labor for a year.[23]

The consistent interpretation of the officials charged by Congress with the responsibility for implementing the statutory scheme belies petitioner's contention. Cf. *Udall* v. *Tallman*, 380 U.S. 1, 4. Thus, the Manual for Courts-Martial, promulgated by the President pursuant to Article 36, 10 U.S.C. 836, recognizes that the convening authority may provide for confinement in two quite distinct situations: for execution of the sentence (when permissible prior to completion of appellate review), and simply, for interim restraint pending review. Paragraph 89c of the Manual provides relevantly:

* * * * *

> (5) *Place of confinement.*—If the convening authority orders a sentence of confinement at hard labor into execution, the place of confinement, as prescribed in pertinent departmental regulations, will be designated in his action. When a sentence of confinement is ordered into execution subsequent to the initial action of

[23] Petitioner argued in the court below that the sentence to confinement at hard labor was severable into its elements and thus that the imposition of confinement pending appeal "executed" the confinement portion of the sentence adjudged by the court-martial. The sentence is not severable, however. The Manual clearly provides that in the case of a convicted officer a sentence to confinement *must* include hard labor. Manual, para. 126j. Nor may hard labor without confinement be imposed upon an officer by a court-martial. Manual, para. 126k. Thus, the proposed transfer and the type of restraint to which petitioner was subjected in this case did not "execute" (in the sense of "carry out") the sentence of the court-martial to confinement at hard labor.

the convening authority, the authority ordering such execution will designate the place of confinement in the promulgating order. In this connection, see 93.

(6) *Temporary custody.*—When a record of trial involving an approved sentence is required to be forwarded to the appropriate Judge Advocate General (Art. 65*a*, b), the convening authority will, unless he orders any approved sentence of confinement into execution and designates a place of confinement, provide in his action for the temporary custody of the accused pending final disposition of the case upon appellate review. If practicable, the accused in such a case should be retained within the command of the officer exercising general court-martial jurisdiction over the accused until the sentence has become final after completion of any appellate review. See appendix 14 (form 34) for form of action and 96 for action to be taken in event the place of temporary custody (confinement) is changed prior to final disposition of the case upon appellate review.

See, also, para. 93: AF Manual 125–2, 16–16. In the present case, the convening authority sought to do no more than exercise his responsibility, under subparagraph (6), *supra,* to provide for petitioner's temporary custody—which the subparagraph recognizes may extend to "confinement" —"[p]ending completion of appellate review * * *" (A. 31). See *United States* v. *Petroff-Tachomakoff,* 5 U.S.C.M.A. 824, 826, 19 C.M.R. 120, 122.

Although the subparagraph indicates that ordinarily the accused should be retained within the local

command, it qualifies this ordinary goal with the caveat, "If practicable". Because special problems are presented by court-martialed officers, the Secretary of the Air Force has directed that, pending final action upon appellate review, a convicted officer will be "assigned to an installation having adequate facilities for the amount of restraint the commander thinks necessary pending final action on the case." AF Manual 125–2, ¶ 6–16a.[24]

There is clear judicial authority that what may be practicable for enlisted men may not suffice for officer prisoners. Thus, in *Levy* v. *Resor,* 384 F. 2d 689 (C.A. 4), certiorari denied, 389 U.S. 1049, the Army sought permission to transfer a court-martialed captain, whose sentence to three-years' confinement at hard labor and dismissal was being reviewed by a board of review, from his post to the disciplinary barracks at Fort Leavenworth while his military and civilian (bail) appeals were being considered. The court upheld the Army's decision to transfer him, finding that Fort Leavenworth

> has suitable facilities for the custody of officer prisoners, and * * * the transfer would be in

[24] The Secretary has generally provided that "adjudged" personnel—those under a sentence to confinement which has not been ordered executed pending final appellate action—"will ordinarily be committed to the disciplinary barracks nearest the place of trial for confinement pending completion of appellate review (unless retention within the trial area is thought necessary) * * *" if they are considered "nonrestorable." AF Manual 125–2, ¶ 6–8b. Unless they are found to be contrary to the Code, such regulations "implementing the codal requirements" have the force of law. *United States* v. *Byrant,* 12 U.S.C.M.A. 133, 138, 30 C.M.R. 133, 138.

> accordance with the customary handling of such prisoners * * *.

384 F. 2d at 690. See, also, AR 633–5, ¶ 4b(2). There was no suggestion that this transfer would constitute premature "execution" of Levy's sentence in violation of Article 71(c) of the Uniform Code. That decision was recently followed in a well-reasoned opinion of the district court in Kansas (*Levy* v. *Dillon,* 286 F. Supp. 593, appeal pending (C.A. 10)), specifically considering the Article 71(c) contention and expressly disapproving the decision of the district court in the instant case that such a transfer would "amount to" (A. 19) a violation of that Article.

These holdings are sound. The district court in this case agreed that military authorities have lawful discretion, consonant with Article 71(c), to impose restraint, including confinement, upon a military accused while the results of appellate review are awaited (A. 19, 20). Any other conclusion would have meant, of course, that the manuals and regulations issued by the President and the Service Secretaries to implement the Code have misunderstood the scope of the term "executed" in Article 71(c). The district judge ruled, however, without any explanation or factual support, that it seemed to him that transfer to this particular disciplinary barracks would illegally "execute" the sentence. The court's conclusion apparently rested in part on the accurate understanding that the Barracks is the type of institution

at which petitioner's sentence to confinement *could* appropriately be "executed" upon completion of appellate review. See Article 58, 10 U.S.C. 858. But the court also appears to have relied on a clearly erroneous assumption that "the sentence provided he was going to Leavenworth for a year" (Tr. 58). The district judge explained: "I am saying that sending him to Leavenworth is in effect executing the sentence because that is where the sentence says he had to go to serve the sentence" (Tr. 62). But this critical premise in the court's reasoning is simply wrong. As in this case, a sentence of a court-martial does *not* fix the place for service of the sentence but merely pronounces the punishment. The place of execution of the sentence is not determined until the sentence is finally ordered executed and the determination is made by the authority promulgating that order. See Manual, paras. 89(c)(5), 93. In this case, of course, the convening authority in approving the sentence purported to do no more than provide for *interim custody* at Fort Leavenworth pending appellate review. See A. 31; Manual, para. 89(c)(6), *supra*, p. 40.[25]

In this Court, petitioner's basic argument on this issue is similar—that because the Disciplinary Barracks at Fort Leavenworth is a maximum security military prison, confinement there must be considered

[25] The reference to Fort Leavenworth in the Staff Judge Advocate's memorandum does not have the sinister meaning petitioner would attribute to it (Br. p. 55 n. 26); taken in context, this was nothing more than the recommendation, accepted by the convening authority, that petitioner be transferred there pending review.

as punitive and thus as "execution" of the sentence (Pet. Br. pp. 56–57). As noted in *Levy* v. *Dillon, supra,* however, the circumstances under which an "adjudged" officer-prisoner is confined differ significantly, under military regulations, from those of a "sentenced" prisoner, whose sentence has been ordered executed.[26] The most pertinent distinction relevant to whether a sentence to hard labor is being "executed," in the sense of being "carried out" or "performed," *Sweet* v. *Taylor, supra,* is of course whether petitioner could have been compelled to do hard labor. On this crucial question Air Force regulations are quite specific, providing that "adjudged" officers who are in confinement "are not required to perform labor except for the necessary policing of their own quarters." AF Manual 125–2, ¶ 2–16d. In addition, even in confinement at Fort Leavenworth, petitioner would have retained the privileges of his rank of captain (since his dismissal from the Air Force cannot be executed until appellate review has been completed) and could have continued to wear his service uniform, with any decorations and insignia, rather than the work uni-

[26] "An 'adjudged' prisoner is a person who has been tried by court-martial and sentenced to confinement, but whose sentence has not yet been approved or ordered executed." "A 'sentenced' prisoner is a person who has been convicted by court-martial and whose sentence has been approved and ordered executed as required by law." *United States* v. *Nelson*, U.S.C.M.A. No. 21,512, decided March 14, 1969, Slip Op., nn. 2–3. See, also, AF Manual 125–2, Att. 1.

form normally worn by sentenced prisoners subject to hard labor. AF Manual 125–2, ¶ 3–5b.[27]

We assume the district judge was unaware of these dispositive circumstances when he ruled from the bench that the proposed transfer to Fort Leavenworth would have amounted to illegal "execution" of petitioner's sentence. Petitioner's failure to raise this contention either on appeal to a board of review or by application to the Court of Military Appeals for extraordinary relief may, in these circumstances, reflect a belief that the tribunals with expertise in this area would probably have rejected the claim—and properly so. Compare *Gusik* v. *Schilder,* 340 U.S. 128, 133.

B. MILITARY SUPERIORS HAVE AUTHORITY TO PLACE A PERSON CONVICTED BY COURT-MARTIAL UNDER RESTRAINT PENDING APPELLATE REVEIW OF HIS CONVICTION

Apart from his allegation that the proposed transfer to Fort Leavenworth would constitute illegal execution of his sentence, petitioner also argued that no restraint on him was warranted pending review of his conviction and that the district court should order

[27] While not strictly relevant, we note that petitioner errs in his assertion (Pet. Br. p. 57) that "all" of petitioner's mail would be "censored." Outgoing mail to the President, Vice President, Members of Congress, Attorney General, Judge Advocate General and their representatives, defense counsel, attorneys of record, chaplains and clergymen, *inter alia*, is all privileged. Other outgoing and incoming mail is *inspected*, not censored, as a matter of security. See Manual For the Guidance of Prisoners, United States Disciplinary Barracks, Fort Leavenworth, Kansas (1967 ed.) pp. 17–18.

him released. See A. 13–14. On this latter question, relief was denied, with the explanation (A. 19):

> the right of a person in the military service to bail pending appeal from conviction is not constitutional, but statutory only, and * * *, in the military, there is no statutory provision for such bail. This Court * * * concludes that it has no right to say what bail, if any, should be set for the petitioner, nor to state what conditions of release, if any, should be imposed. Those matters are properly within the discretion of the military authority, and it may be that the appropriate officials will feel that petitioner should be confined during the review procedures. * * *

This holding was sound. The district court properly found itself without jurisdiction on habeas corpus to review the discretionary determination of petitioner's superior officers to impose post-conviction restraint on him. This Court has consistently ruled that habeas corpus does not lie to review the propriety of a discretionary determination made as part of the court-martial process under the Uniform Code and the Manual for Courts-Martial. *E.g., Whelchel* v. *McDonald,* 340 U.S. 122, 124; *Jackson* v. *Taylor,* 353 U.S. 569, 578 n. 10; cf. *United States* v. *Augenblick,* 393 U.S. 348, 352. Accordingly, the only question conceivably open to review in this proceeding is whether post-conviction restraint on military prisoners is authorized by law; if so, under this Court's settled holdings, the choice made by the military commander is not collaterally reviewable.

1. Tested by these standards, modifications in peti-

tioner's position, as significantly modified during this litigation, does not establish even a threshold basis for the habeas corpus jurisdiction of the federal civilian courts.

In his petition for a writ of habeas corpus, petitioner argued that *no* restraint upon him pending appellate review would be legal. In part this contention was based upon the erroneous premise that any restraint would involve "service" of his sentence, which would violate due process in the event his conviction were later reversed. See A. 11. As we have seen above, a military accused receives credit toward the "service" of his sentence whether or not he is in confinement and, what is more, confinement does not necessarily constitute "execution" of a sentence. This contention, however, was abandoned in the district court, and responsibly so, since the argument would analogously have turned every denial of post-conviction bail in the civilian courts—or even the grant of bail subject to restrictions—into a due process violation because of the possibility that the underlying conviction might subsequently be reversed. Thus, this challenge to the validity of post-conviction restraint has been removed from the case.

Petitioner also argued initially in his pleading in the district court that no restraint was *necessary* in this case (see A. 13), but this argument too was modified critically. Thus, at the hearing his counsel expressly conceded that, instead of ordering petitioner transferred to Fort Leavenworth, "the general can keep him in quarters arrest until—as a fair compro-

mise pending appeal—even though we urge that it is not" (Tr. 53). And petitioner now admits that some restraint may well have been authorized, arguing only that "physical confinement" beyond mere "moral restraint" was not warranted. See Br. pp. 61–62.

If these concessions are accepted at face value, however, two district grounds justify affirmance without further study. First, as we have observed, this Court has consistently disclaimed the existence of jurisdiction in civil courts on habeas corpus to review the choices made by court-martial authorities from among the range of alternatives allowed by law. That salutary principle applies with equal force and policy to the field commander's assessment of the type of restraint, if any, that should be imposed upon one of his subordinate officers awaiting review of his court-martial conviction and sentence to dismissal and confinement at hard labor.

And second, in the terms of his concession, petitioner has never been under a form of restraint other than the "moral" compulsion involved in being ordered into arrest. He averred in the district court that from the time his sentence was adjudged he was placed "in the status of arrest in quarters" (A. 4). As modified when the transfer to Fort Leavenworth was cancelled, this arrest status continued until petitioner was released pursuant to Mr. Justice Douglas' order. Article 9(a) of the Code, 10 U.S.C. 809(a), provides:

> Arrest is the restraint of a person by an order, not imposed as a punishment for an of-

> fense, directing him to remain within certain specified limits. Confinement is the physical restraint of a person.

The Manual expands upon the difference, explaining:

> [a]rrest is moral restraint imposed upon a person by oral or written orders of competent authority limiting the person's personal liberty pending disposition of charges. The restraint imposed is binding upon the person arrested, not by physical force, but by virtue of his moral and legal obligation to obey the order of arrest. * * *

Para. 20a. As the base commander's letter modifying petitioner's arrest status shows (A. 32–34), petitioner was not locked in his room and was not under guard; he was expressly authorized to visit eight different facilities and was advised: "You will not be escorted on these trips" (A. 33). Thus, petitioner's status fits squarely within the degree of restraint even he seems to have conceded was appropriate.

Nevertheless, since these concessions may have been unintentionally dispositive, we shall trace the origin of a commanding officer's authority to impose post-conviction restraint pending appellate review. Our purpose will be to demonstrate that petitioner was lawfully subject to restraint pending appellate review, and a civil court on habeas corpus may inquire no further.

2. That some restraint, even confinement, may be imposed even before a sentence can be ordered ex-

ectued is at least implicit in the Uniform Code.[28] As previously discussed, Article 57(b) of the Code directs that a sentence to confinement imposed by a court-martial commences to run, unless suspended, as of the date it is adjudged, *irrespective* of whether any restraint is imposed on the convicted serviceman. The purpose of the article was "to prevent accused persons from languishing *in confinement* between sentence and date of execution without receiving credit therefor", *United States* v. *Bryant*, 12 U.S.C.M.A. 133, 138, 30 C.M.R. 133, 138 (emphasis supplied). This purpose manifests an understanding that there could be confinement of military prisoners pending "execution" of the sentence. Both military and civilian courts have ruled that, under the statutory and regulatory scheme of the Uniform Code as a whole, military authorities may lawfully impose restraint upon convicted military prisoners pending appellate review. See, *e.g.*, *Levy* v. *Resor*, 17 U.S.C.M.A. 135, 37 C.M.R. 399; *Levy* v. *Resor*, 384 F. 2d 689 (C.A. 4), certiorari denied, 389 U.S. 1049; *Levy* v. *Dillon*, 286 F. Supp. 593 (D. Kan.), appeal pending (C.A. 10).

[28] Article 13, 10 U.S.C. 813, speaks of the allowable forms of restraint that can be imposed upon a person held for trial "or the result of trial". While that Article is captioned only "Punishment prohibited before trial" and the Manual (para. 21d) uses the phrase "result of a trial" only with reference to the finding of guilty or not guilty, the Court of Military Appeals has found in Art. 13 authority to impose post-conviction restraint pending appellate review. *United States* v. *Teague*, 3 U.S.C.M.A. 317, 324, 12 C.M.R. 73, 80.

This conclusion is borne out by the provisions of the Manual. Paragraph 21d provides:

> Responsibility for restraint after trial. Upon notification from a trial counsel of the result of a trial (44*e*(2)), a commanding officer will take prompt and appropriate action with respect to the restraint of the person tried. Such action, depending on the circumstances, may involve the immediate release of the person from any restraint, *or the imposition of any necessary restraint pending final action on the case* (emphasis added).[29]

In the *Levy* cases both the Court of Appeals for the Fourth Circuit and the Court of Military Appeals ruled that the restraint imposed on Captain Levy pending appeal of his court-martial conviction—*i.e.*, placing him in a room in the post hospital under twenty-four hour guard—was lawful under paragraph 21d. By contrast, in the present case, petitioner was merely ordered into arrest, but he was allowed to leave his room in the Visiting Officers' Quarters to carry on routine activities without escort, was permitted to have maid service and a television, and was entitled to receive regular visits from his family and friends. See A. 32–34.

---

[29] In the *Levy* case, *supra*, the Court of Military Appeals observed:

> While it seems more likely that that portion of the paragraph relating to "the immediate release of the person from any restraint" applies to those accused who have been acquitted by judgment of the court (see paragraph 22), we will assume that it also applies to convicted persons awaiting final action. * * *

17 U.S.C.M.A. at 140, 37 C.M.R. at 404.

3. Petitioner argues, however (Pet. Br. pp. 58–59), that Article 13 of the Code, 10 U.S.C. 813, conditions the purposes for which post-conviction restraint may be imposed. That article provides that:

> Subject to section 857 of this title (Article 57), no person, while being held for trial or the result of trial, may be subjected to punishment or penalty other than arrest or confinement upon the charges pending against him, nor shall the arrest or confinement imposed upon him be any more rigorous than the circumstances require to insure his presence, but he may be subjected to minor punishment during that period for infractions of discipline.

Petitioner contends that the phrase "while being held for * * * the result of trial" embraces not only the time before verdict, but the period of appellate review. From this he concludes that the stricture against imposition of any restraint "more rigorous than the circumstances require to insure [the accused's] presence" establishes the *sole* justification for post-conviction restraint. He points to the decisions in *United States* v. *Teague,* 3 U.S.C.M.A. 317, 12 C.M.R. 73, and *United States* v. *Petroff-Tachomakoff,* 5 U.S.C.M.A. 824, 19 C.M.R. 120, as interpreting the phrase "held for * * * the result of trial" to "include post-conviction military personnel who were awaiting the results of the military appellate process" (Pet. Br. p. 58).

While those cases do find express statutory support in Article 13 for imposing post-conviction restraint,

they do not hold that the permissible grounds for pretrial restraint are also the *only* justification for posttrial restraint. In both cases, the imposition of restraint on persons convicted by court-martial was upheld under the authority of paragraph 21d of the Manual, as necessary to insure the presence of the accused throughout the appellate proceedings. The court did not, however, purport to hold that this was the only reason which *could* validly be given for sustaining the imposition of post-conviction restraint in any case. Rather, its opinions were geared to the particular circumstance that the enlisted men in each of those cases had dubious attendance records, thus making the purpose of insuring continued presence the most obvious basis for restraint. In analyzing the relationship between Article 13 of the Code and paragraph 21d of the Manual, which is concerned solely with post-conviction restraint, the *Teague* opinion concludes that the "Manual provision is *supplemental,* and not contradictory, to the provisions of the Code." 3 U.S.C.M.A. at 324, 12 C.M.R. at 80 (emphasis added). Indeed, any other interpretation would lead to the anomalous conclusion that a *civilian* defendant would be subject to restraint after conviction which would not be lawful for a member of the highly disciplined military establishment; it has long been recognized, by Congress and this Court, that civilian defendants may be denied release on bond *after* conviction for reasons other than likelihood of flight. See

18 U.S.C. 3148; F.R. Crim. P. 46(a)(2); *Carlson* v. *Landon*, 342 U.S. 524, 545 n. 45; *Stack* v. *Boyle*, 342 U.S. 1, 18 (opinion of Jackson, J.); *Carbo* v. *United States*, 82 S. Ct. 662 (Douglas, J.), review denied. 369 U.S. 868. Military law, like civilian, recognizes a meaningful difference in status between those who are mere accused and those who have been found guilty—even though the conviction is not yet final. See, *e.g.*, *United States* v. *Nelson*, U.S.C.M.A. No. 21,512, decided March 14, 1969.[30]

4. The question remains as to what restraint is proper with respect to an "adjudged" prisoner. We agree that what petitioner describes as "penal incarceration" or "punitive incarceration" (Br. pp. 50, 52, 55) would not be permitted by the Code. It seems evident that the purpose of the prohibition in Article 71(c) against "execution" of a sentence to confinement before appellate approval is to preclude the imposition of restraint which amounts to punishment. The Manual carries through on this policy, directing (para. 18b(3)):

> Other than restraint administered as prescribed in this subparagraph * * * no punishment may

[30] In fact, prior to the deferment-of-sentence provision of the Military Justice Act of 1968, to be effective later this year (82 Stat. 1335, 1341), see note 9, *supra*, neither the Congress nor the President had provided for any analogue to bail for military prisoners. See *Levy* v. *Resor*, *supra*, 17 U.S.C.M.A. at 137–140, 37 C.M.R. at 401–404. The Bail Reform Act of 1966 was expressly made inapplicable to offenses triable by court-martial. See 18 U.S.C. 3152(2).

> be imposed upon an accused as a result of trial by court-martial until the sentence has been approved and ordered executed.

This means, of course, as the Manual explains (paras. 18(b)(3), 125) and Air Force regulations specify (AF Manual 125–2, ¶2–16d), that pending review, a person convicted by court-martial cannot be put to hard labor; it does not mean that restrictions cannot be placed on his liberty in the interest of maintaining discipline.

Given the structured nature of the military community, with its insistence on respect for authority (see *Burns* v. *Wilson,* 346 U.S. 137, 140; *Orloff* v. *Willoughby,* 345 U.S. 83, 94), it would seem within the ambit of a commander's reasonable discretion to determine that an officer convicted of disobeying orders and sentenced to be dismissed from the Air Force should be restrained in the interest of morale and discipline. Restraints of the sort imposed in this case do not constitute punishment but would, in the language of paragraph 21d of the Manual, be deemed "necessary" to the efficiency of the military unit as a whole. There is no reason to believe that by enacting in Article 71(c) a general prohibition against "execution" of a sentence to confinement at hard labor prior to completion of appellate review, Congress implicitly intended to divest commanders of all power to impose restraint on convicted officers in the interest of military discipline.

C. RESTRAINT IN THIS CASE WAS PROPER

The preceding discussion has sought to establish that petitioner's commanding officer was authorized to impose whatever restraint he in his discretion deemed appropriate under all the circumstances pending completion of appellate review of petitioner's court-martial conviction. Under the Court's cases, acceptance of this conclusion should terminate this habeas corpus proceeding, and so the district court ruled. Because petitioner was—properly, we submit—denied relief as a threshold matter of law, the basis for his commanding officer's decision was not explored. But to illustrate the range of considerations which may legitimately be taken into account, some of which are evidently appropriate here, we respectfully refer the Court to the factors brought to the attention of the Court of Appeals for the Fourth Circuit in the *Levy* case to explain why confinement and transfer of an officer-prisoner were warranted.

In ordering Captain Levy confined to hospital quarters under guard pending completion of appellate review, his commanding officer indicated that his action was taken for the following reasons:

> * * * I have considered, among other things, the impact upon morale and discipline of military personnel stationed at Fort Jackson and throughout the Armed Services of any removal of all restraint as suggested; my obligation to insure the safety of Captain Levy as long as he remains at Fort Jackson; the fact that under

> the system of military justice established by the Uniform Code of Military Justice, sentences to confinement begin when the sentence is adjudged and are uninterrupted by parole or other lifting of the restraint, while under the nonmilitary system of criminal justice a sentence to confinement does not begin until the convicted person is incarcerated; and the very real possibility that Captain Levy's release from restriction would be construed by enlisted personnel as discriminatory since an enlisted man convicted of comparable offenses and under sentences to confinement would not be relieved of all restraint. [See Brief for the Respondents in Opposition, No. 860 O.T., 1967, pp. 5–6.]

Thereafter, the commanding officer stated in an affidavit that he also took account of (1) information received from a confidential informant that Captain Levy intended to flee to a foreign jurisdiction if released, (2) the seriousness of the offenses of which he was convicted, particularly the offense of wilful disobedience of the order of his superior, and (3) the harmful effect upon morale which his release would have. Brief in Opposition, *supra,* pp. 6–7.

Petitioner, in pressing his contention that the *sole* reason for which restraint pending appeal may be imposed is to insure the presence of the accused, relies on the fact that in the *Levy* proceedings there was reference to the possibility of flight (Pet. Br. p. 60 n. 30). It is noteworthy, however, that neither the Court of Military Appeals nor the Fourth Circuit

singled out this factor as the *sine qua non*. Instead, as the Court of Military Appeals observed, "[e]ach case must be decided on its own merits"; finding that in "the facts * * * and circumstances * * * of this case" there had been no "abuse of discretion" under Manual, para. 21d, the restraint there imposed was sustained. 17 U.S.C.M.A. at 140–141, 37 C.M.R. at 404–405.

There can be little question of the reasonableness of the commanding officer's action in the present case in ordering imposition of the relatively mild restraint of arrest to quarters pursuant to the directive set forth at A. 32–34. It surely cannot be regarded as an abuse of discretion to order an officer sentenced to dismissal and imprisonment to remain in his quarters except when engaged in routine activities. Compare the *Levy* cases.[31] If, therefore, this Court determines that it can and should reach this question, we submit that the restraint imposed on petitioner pending completion of appellate review should be held to have been lawful.

---

[31] Whether petitioner's commanding officer actually considered the possibility of flight does not appear. The following facts are, however, of record: petitioner is a senior pilot qualified as an instructor for the latest military aircraft (A. 37–38); the refusal to obey an order which led to his court-martial was based upon his conscientious belief that this country's involvement in Vietnam is unjust and immoral (A. 37); since 1966 he has been seeking to resign or be released from the Air Force (A. 6, 37); at all relevant times petitioner has been stationed at Cannon Air Force Base, Clovis, New Mexico (A. 4, 17, 32–34), approximately 250 miles from the Mexican border.

CONCLUSION

If the Court determines that the case has become moot, the judgment below should be vacated and the cause remanded with directions to dismiss as moot. Otherwise, either for failure to exhaust his military remedies or for lack of substance to his contentions, the judgment denying relief to petitioner should be affirmed.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.
WILL WILSON,
Assistant Attorney General.
PHILIP A. LACOVARA,
JOSEPH J. CONNOLLY,
Assistants to the Solicitor General.
BEATRICE ROSENBERG,
ROGER A. PAULEY,
Attorneys.

APRIL 1969.

338-797—69——5

APPENDIX

1. The Uniform Code of Military Justice, 10 U.S.C. 801 *et seq.*, provides in pertinent part:

ART. 9. Imposition of restraint.

(*a*) Arrest is the restraint of a person by an order, not imposed as a punishment for an offense, directing him to remain within certain specified limits. Confinement is the physical restraint of a person.

(*b*) An enlisted member may be ordered into arrest or confinement by any commissioned officer by an order, oral or written, delivered in person or through other persons subject to this chapter. A commanding officer may authorize warrant officers, petty officers, or noncommissioned officers to order enlisted members of his command or subject to his authority into arrest or confinement.

(*c*) A commissioned officer, a warrant officer, or a civilian subject to this chapter or to trial thereunder may be ordered into arrest or confinement only by a commanding officer to whose authority he is subject, by an order, oral or written, delivered in person or by another commissioned officer. The authority to order such persons into arrest or confinement may not be delegated.

(*d*) No person shall be ordered into arrest or confinement except for probable cause.

(*e*) Nothing in this article limits the authority of persons authorized to apprehend offenders to secure the custody of an alleged offender until proper authority may be notified.

ART. 10. Restraint of persons charged with offenses.

Any person subject to this chapter charged with an offense under this chapter shall be ordered into arrest or confinement, as circumstances may require; but when charged only with an offense normally tried by a summary court-martial, such person shall not ordinarily be placed in confinement. When any person subject to this chapter is placed in arrest or confinement prior to trial, immediate steps shall be taken to inform him of the specific wrong of which he is accused and to try him or to dismiss the charges and release him.

ART. 13. Punishment prohibited before trial.

Subject to section 857 of this title (article 57), no person, while being held for trial or the result of trial, may be subjected to punishment or penalty other than arrest or confinement upon the charges pending against him, nor shall the arrest or confinement imposed upon him be any more rigorous than the circumstances require to insure his presence, but he may be subjected to minor punishment during such period for infractions of discipline.

ART. 57. Effective date of sentences.

(*a*) Whenever a sentence of a court-martial as lawfully adjudged and approved includes a forfeiture of pay or allowances in addition to confinement not suspended, the forfeiture may apply to pay or allowances becoming due on or after the date the sentence is approved by the convening authority. No forfeiture may extend to any pay or allowances accrued before that date.

(*b*) Any period of confinement included in a sentence of a court-martial begins to run from the date the sentence is adjudged by the court-martial, but periods during which the sentence to confinement is suspended shall be excluded in computing the service of the term of confinement.

(*c*) All other sentences of courts-martial are effective on the date ordered executed.

ART. 71. Execution of sentence; suspension of sentence.

(*a*) No court-martial sentence extending to death or involving a general or flag officer shall be executed until approved by the President. He shall approve the sentence or such part, amount, or commuted form of the sentence as he sees fit, and may suspend the execution of the sentence or any part of the sentence, as approved by him, except the death sentence.

(*b*) No sentence extending to the dismissal of commissioned officer (other than a general or flag officer), cadet, or midshipman may be executed until approved by the Secretary concerned, or such Under Secretary or Assistant Secretary as may be designated by him. He shall approve the sentence or such part, amount, or commuted form of the sentence as he sees fit, and may suspend the execution of any part of the sentence as approved by him. In time of war or national emergency he may commute a sentence of dismissal to reduction to any enlisted grade. A person who is so reduced may be required to serve for the duration of the war or emergency and six months thereafter.

(*c*) No sentence which includes, unsuspended, a dishonorable or bad-conduct discharge, or confinement for one year or more, may be executed until affirmed by a board of review and, in cases reviewed by it, the Court of Military Appeals.

(*d*) All other court-martial sentences, unless suspended, may be ordered executed by the convening authority when approved by him. The convening authority may suspend the execution of any sentence, except a death sentence.

2. The Manual for Courts-Martial, United States, 1951, provides in pertinent part:

> 18. GENERAL.—*a. Definitions.—Apprehension* is the taking into custody of a person (Art. 7*a*; see 174*d*).
>
> *Arrest* is the restraint of a person by an order not imposed as punishment for an offense directing him to remain within certain specified limits (Art. 9*a*).
>
> *Confinement* is the physical restraint of a person (Art. 9*a*).
>
> *b. Basic considerations.*—(1) Any person subject to the code accused of an offense under the code shall be ordered into arrest or confinement as circumstances may require; but when accused only of an offense normally tried by a summary court-martial, such person ordinarily shall not be placed in confinement (Art. 10). The foregoing provision is not mandatory and its exercise rests within the discretion of the person vested with the power to arrest or confine. No restraint need be imposed in cases involving minor offenses. A failure to restrain does not affect the jurisdiction of the court.
>
> * * * * *
>
> 20. RESTRAINT.—*a. Status of person in arrest.* —As used in this chapter, arrest is moral restraint imposed upon a person by oral or written orders of competent authority limiting the person's personnel liberty pending disposition of charges. The restraint imposed is binding upon the person arrested, not by physical force, but by virtue of his moral and legal obligation to obey the order of arrest. He is subject to the restrictions incident to arrest prescribed in applicable regulations. A person in the status of arrest cannot be required to perform his full military duty, and if he is placed—by the authority who placed him in arrest or by superior authority—on duty inconsistent with such sta-

tus his arrest is thereby terminated. This, however, does not prevent his being required to do ordinary cleaning or policing within the specified limits of his arrest, or to take part in routine training and duties not involving the exercise of command or the bearing of arms.

b. Restriction in lieu of arrest.— An officer authorized to arrest (21*a*) may, within his discretion and without imposing arrest, restrict an accused person of his command, or subject to his authority, to specified areas of a military command with the further provision that he will participate in all military duties and activities of his organization while under such restriction. Thus an accused person may be required to remain within a specified area at specified times either because his continued presence pending investigation may be necessary or because it may be considered a wise precaution to restrict him to such an area in order that he may not again be exposed to the temptation of misconduct similar to that for which he is already under charges. Violations of such restrictions are punishable as violations of Article 134, as are breaches of punitive restrictions.

c. Confinement prior to trial.—As used in this chapter, confinement is physical restraint, imposed by either oral or written orders of competent authority, depriving a person of freedom pending the disposition of charges. Confinement will not be imposed pending trial unless deemed necessary to insure the presence of the accused at the trial or because of the seriousness of the offense charged.

d. Procedure for arresting or confining.—(1) *Preliminary inquiry into offense.*—No person shall be ordered into arrest or confinement except for probable cause (Art. 9*d*). No authority shall order a person into arrest or confinement unless he has personal knowledge of the offense or has made inquiry into it. Full inquiry is

not required, but the known or reported facts should be sufficient to furnish reasonable grounds for believing that the offense has been committed by the person to be restrained.

(2) *Procedural steps to arrest.*—An arrest is imposed by notifying the person to be arrested that he is under arrest and informing him of the limits of his arrest. The order of arrest may be either oral or written.

(3) *Procedural steps to confine.*—A person to be confined is placed under guard and taken to the place of confinement. The authority ordering the confinement will cause to be delivered to the provost marshal, commander of the guard, prison officer, or master at arms, a written statement of the name, grade, and organization of the prisoner and of the offense of which he is accused. No provost marshal, commander of the guard, prison officer, or master at arms shall refuse to receive or keep any prisoner committed to his charge by an officer of the armed forces when the committing officer furnishes a statement, signed by him, of the offense charged against the prisoner (Art. 11*a*).

(4) *Notification to accused.*—When any person subject to the code is placed in arrest or confinement prior to trial, immediate steps shall be taken to inform him of the specific wrong of which he is accused and to try him or to dismiss the charges and release him (Art. 10). Concerning the time element between service of charges and trial, see Article 35. See Article 98 concerning unnecessary delay in the disposition of any case.

(5) *Report required.*—Every commander of a guard, prison officer, or master at arms to whose charge a prisoner has been committed shall, within 24 hours after such commitment, or, in the case of a commander of the guard or master at arms, as soon as he is relieved from guard, report in writing to the commanding

officer the name of such person, the offense charged against him, and the name of the person who ordered or authorized the commitment (Art. 11*b*).

e. Unlawful detention.—Any person subject to the code who, except as provided by law, apprehends, arrests, or confines any person is subject to trial by court-martial (Art. 97).

21. ARREST AND CONFINEMENT.—*a. Who may arrest or confine.*—Persons subject to the provisions of the code or to trial thereunder may be ordered into arrest or confinement as follows:

(1) *Officer, warrant officer, or civilian.*—Only a commanding officer to whose authority the individual is subject may order an officer, warrant officer, or civilian into arrest or confinement. The arrest or confinement must be effected by an order, oral or written, delivered in person or by another officer (Art. 9*c*). The authority to order such persons into arrest or confinement may not be delegated (Art. 9*c*). For this particular purpose, the term "commanding officer" shall be construed to refer to an officer commanding a post, camp, station, base, auxiliary airfield, Marine barracks, naval or Coast Guard vessel, shipyard, or other place where members of the armed forces are on duty, and the officer commanding or in charge of any other command who, under Article 24, has power to appoint a summary court-martial.

* * * * *

c. Authority of courts-martial to restrain.—A court-martial has no control over the nature of the arrest or other status of restraint of a prisoner except as regards his custody in its presence.

d. Responsibility for restraint after trial.—Upon notification from a trial counsel of the result of a trial (44*e* (2)), a commanding officer will take prompt and appropriate action with respect to the restraint of the person tried.

Such action, depending on the circumstances, may involve the immediate release of the person from any restraint, or the imposition of any necessary restraint pending final action on the case.

97. MISCELLANEOUS MATTERS.

* * * * *

c. Interruptions of execution of a sentence.— A sentence to confinement, hard labor without confinement, restriction to limits, deprivation of privileges, or suspension from rank, command, or duty is continuous until the term expires, with certain exceptions. These exceptions include the following:

When delivery under Article 14 is made to any civil authority of a person undergoing sentence of a court-martial, such delivery, if followed by conviction in a civil tribunal, shall be held to interrupt the execution of the sentence of the court-martial, and the offender after having answered to the civil authorities for his offense shall, upon the request of competent military authority, be returned to military custody for the completion of the said court-martial sentence (Art. 14*b*).

Periods during which the person undergoing such a sentence is absent without authority, or is absent under a parole which proper authority has suspended and later revoked, or is erroneously released from confinement through misrepresentation or fraud on the part of the prisoner, or is erroneously released from confinement upon his petition for a writ of habeas corpus under a court order which is later reversed by a competent tribunal, shall be excluded in computing the service of the term of the punishment.

Periods during which a sentence to confinement is suspended shall be excluded in computing the service of the term of confinement (Art. 57*b*).

3. Air Force Manual 125–2 ("Law Enforcement: Operation of Correction Facilities") provides in pertinent part:

> 6–8. *Commitment to United States Disciplinary Barracks:*
>
> a. Sentenced military personnel who are initially considered nonrestorable will be committed to the nearest United States Disciplinary Barracks from the place of trial (or the port of debarkation, if received from overseas) if they have the required amount of time remaining to serve. Prisoners must have at least six months confinement left to serve to be committed. "Time left to serve" is the time from the expected date of arrival at the disciplinary barracks to the prisoner's current minimum release date.
>
> b. Adjudged military personnel initially considered nonrestorable, whose sentences have been promulgated, will ordinarily be committed to the disciplinary barracks nearest the place of trial for confinement pending completion of appellate review (unless retention within the trial area is thought necessary), and provided they meet the "time left to serve" requirements in a, above.
>
> * * * * *
>
> 6–16. *Officers and Warrant Officers Sentenced to Dismissal or Punitive Discharge.* Pending final action of the case upon appellate review, the following disposition will be made of an officer or warrant officer sentenced to dismissal or punitive discharge, after the sentence has been approved by the convening authority:
>
> a. If the trial took place within the CONUS the officer or warrant officer will ordinarily not be transferred, but separated from his present organization. In cases where the sentence as approved by the convening authority includes a period of confinement, the officer or warrant

officer is assigned to an installation having adequate facilities for the amount of the restraint the commander thinks necessary, pending final action on the case.

4. Army Regulation 633–30, Air Force Regulation 125–30 ("Apprehension and Confinement: Military Sentences to Confinement"), provides in pertinent part:

* * * * *

4. *Operation of Sentences.—a. Beginning date.* The date the sentence of a court-martial is adjudged will mark the beginning of a sentence to confinement whether or not the accused had then been placed in confinement.

5. *Operative and inoperative time.—a. Operative.* A sentence to confinement, hard labor without confinement, restriction to limits, or deprivation of privileges is continuous until the term expires and is interrupted only by inoperative time.

b. Inoperative. Inoperative time consists of any period during which a prisoner is not credited with serving his sentence. Inoperative time will include the period while absent without authority; while absent from confinement on a parole which proper authority has suspended and later revoked; while erroneously released from confinement through misrepresentation or fraud on the part of the prisoner; while absent after delivery to civil authorities, if subsequently convicted by a civil tribunal; while in a restored to duty status under a suspended sentence, the suspension of which is later vacated; or while the sentence is interrupted as prescribed in paragraph 4*b*(1). An escaped prisoner who is returned to military authority, but whose status as a prisoner is not known to such authority, and who conceals his status as a prisoner, continues to be "absent without authority" within the meaning of this regulation.

U.S. GOVERNMENT PRINTING OFFICE: 1969